



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Delta Concepts, Inc.

File: B-230632

Date: July 13, 1988

DIGEST

1. Bid submitted in response to a total small business set-aside which failed to certify that all end items will be manufactured or produced by small business concerns properly was rejected as nonresponsive.

2. Generally, completion of Place of Performance clause relates to responsibility of bidder and not responsiveness of bid; therefore, completion of clause does not cure failure to certify that all end items will be manufactured or produced by a small business. Case holding otherwise no longer will be followed.

DECISION

Delta Concepts, Inc., protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. DAAB07-88-B-C032, a small business set-aside issued by the Department of the Army for a 2-year requirements contract for dry batteries. The Army rejected the bid because Delta did not complete the IFB's Small Business Concern Representation provision. That standard provision, which also is set forth in Federal Acquisition Regulation (FAR) § 52.219-1 (FAC 84-28), requires a bidder to certify whether it is a small business concern and whether all of the items to be furnished will be small business products. Delta indicated in its bid that it was a small business concern, but failed to certify that all end items to be furnished will be manufactured or produced by small businesses.

We deny the protest.

As a general matter, where a bid on a small business set-aside omits the certification in issue it is viewed as failing to establish the bidder's legal obligation to furnish end items manufactured or produced by a small

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business concern, and the bid must be rejected as nonresponsive;^{1/} otherwise, the small business contractor would be free to provide the end items from either small or large businesses as its own interests might dictate, thus defeating the purpose of the set-aside program. FAR § 14.404-2 (FAC 84-5); Rocco Industries, Inc., B-227636, July 24, 1987, 87-2 CPD ¶ 87.

Delta contends that its bid falls within a limited exception we have recognized to the above rule. In ASC Industries, B-216293, Dec. 21, 1984, 84-2 CPD ¶ 684, we held that a bid in a small business set-aside that did not contain the certification that all supplies would be manufactured by a small business nevertheless could be accepted since the bidder had bound itself through the Place of Performance clause to use a specific supplier, and the agency had information on file indicating that the named supplier was a small business. We said that since the IFB advised that failure to list the place of performance could be cause to reject the bid, and that performance of work at other than the listed location would be prohibited unless approved in writing in advance by the contracting officer, the listing of a supplier the agency knew was a small business effectively established the necessary commitment.

In the IFB Place of Performance clause here, Delta listed "Joseph Pileri" as the owner of the "producing facilities," and indicated an address for such facilities that was the same address as Delta's. The protester contends that the Army should have recognized "Joseph Pileri," who is Delta's vice president and the sole owner of Pileri Industries, as a small business. Delta further points out that completion of the Place of Performance clause was required in this case and that the clause provides that the designated location could not be changed without the contracting officer's prior written permission. These factors, according to Delta, clearly established that the firm would furnish only small business items.

In response, the Army points out that, unlike the solicitation in ASC Industries, the IFB here did not state that the failure to list the place of performance could be cause to reject the bid. The Army argues that the Place of Performance clause therefore cannot be used to make Delta's bid responsive with respect to the requirement to supply

^{1/} A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. FAR § 14.301 (FAC 84-11).

small business end items. The Army also states that it was not reasonably able to ascertain whether the listing of "Joseph Pileri" indicated that the batteries would be produced at a small business facility.

We do not agree with the protester that the Place of Performance clause can be used to establish bid responsiveness to a small business product requirement. We first point out that the language of the clause makes no reference to the small business commitment. Moreover, except for those infrequent instances where an agency has a need for contract performance to occur in a particular locality, see, e.g., 53 Comp. Gen. 102 (1973) (agency properly rejected bid indicating a place of performance 100 miles from San Diego where the solicitation required that ship repair work be performed in the San Diego area), it is well-established that completion of the Place of Performance clause is only for informational purposes, expressing the bidder's present intent, and relates to bidder responsibility rather than to responsiveness. Automatics Limited, B-214997, Nov. 15, 1984, 84-2 CPD ¶ 535. As such, the clause does not necessarily have to be complete in the bid as submitted, see Steel Style, Inc.--Reconsideration, B-219629.3, Sept. 24, 1985, 85-2 CPD ¶ 330, and a bidder is not necessarily precluded from changing its place of performance after bid opening in order to enhance its ability to perform the contract properly. Hanson Industrial Products, B-218723 et al., May 9, 1985, 85-1 CPD ¶ 521.

In sum, a bidder's compliance with solicitation instructions concerning the Place of Performance clause is not related to what the bidder is obligating itself to do through the submission of its bid; we do not think a bidder can be said to have assumed an obligation to furnish a product manufactured by a small business product merely by virtue of listing a small business concern in the Place of Performance clause. Automatics Limited, B-214997, supra.

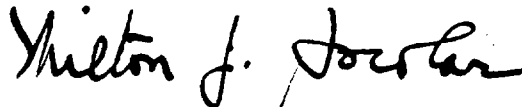
Further, the prohibition in the solicitation regarding changing the performance location does not convert a bidder's entry in the Place of Performance clause into the necessary obligation. The reason is that the prohibition--which, like the Place of Performance clause, has no mention of the small business commitment--essentially addresses a post-award situation. The provision contemplates a case in which an awardee wants to change its performance location, and permits the contracting officer to insure the government receives the same quality of performance to which the parties agreed. We question whether an agency, having accepted a bid that lacked an expression of intent to furnish only small business products, legally could preclude

a contractor from changing performance locations by claiming the change would breach some commitment to supply such items.

In view of the above, we need not decide whether the facts of this case bring it within the holding in ASC Industries. Upon further consideration of the result reached in ASC, we now believe that to the extent that case indicates that the Place of Performance clause may be used to cure a bidder's failure to certify that all end items will be manufactured or produced by a small business, that case will no longer be followed. In ASC Industries, we distinguished Automatics Limited on the basis that in ASC the solicitation warned that failure to list the place of performance could be cause to reject the bid and prohibited changing the performance location without prior written permission. We are now of the view that the existence of these provisions should not have warranted a result in ASC different than that reached in Automatics Limited.

Because acceptance of Delta's bid thus would not legally obligate the company to furnish small business products, the bid properly was rejected as nonresponsive. With respect to Delta's post-bid explanation of what it actually intended, responsiveness is determined from the face of the bid itself; to allow a bidder to make its nonresponsive bid responsive after opening would be tantamount to permitting it to submit a new bid, and thus may not be permitted. Jack Young Associates, Ltd., B-195531, Sept. 20, 1979, 79-2 CPD ¶ 207.

The protest is denied.



Acting Comptroller General
of the United States